IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 645 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UMASHANKAR @ LALJI DINANATH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1,
MR RC KODEKAR APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 22/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 24th February, 2006 passed by the learned 2nd Additional Sessions Judge, Bhavnagar in Sessions Case No.211 of 2005 whereby he was sentenced to undergo rigorous imprisonment for life and fine of Rs.1000/-, in default, to undergo further 3 months S.I. for the charge under Section 302 of the Indian Penal Code.

2. The case of the prosecution in short is that the complainant viz., Shilpaben, d/o. Laxmanbhai Mathurbhai, is residing in Valabhipur village along with his family. She studied upto 3rd standard. She is having two younger sons. Her mother and father are doing labour work. It is also stated in the complaint that the appellant-accused, who is originally a resident of Bihar is residing with them, where complainant resides and doing colour work. Before five days from the day of incident,

the appellant-accused insisted the complainant to keep friendly-relation with him and, therefore, the complainant stopped talking with the appellant-accused. The complainant just got engaged with a boy residing in Devpara village, Taluka Limbdi. On the day of incident at about 8 o'clock, when the complainant was alone because the father of the complainant was sick and was taken to dispensary by her mother and cleaning the utensil, the appellant-accused came and sprinkled some liquid over her and, thereafter, threw burning clothes on her and as a result of which, she received burn injuries on her whole body. It is also stated in the complaint that before committing the offence, the appellant-accused told that the complainant should not keep relation with any body and since he doubted about the character of the complainant, he ignited her and ran away from the place of offence. While burning, as the complainant shouted, brother of the complainant viz., Sanjay came and tried to extinguish the fire by pouring water. As a result of that, persons from the surrounding area assembled there. After some time, the father of the complainant and her uncle viz,. Vikrambhai came there and took her to Government Hospital for

treatment. The complainant stated that the reason behind the offence is that the appellant-accused is residing in the same sheri since last two years and doing colour work and since the complainant refused the proposal made by the appellant-accused, he committed this offence. Accordingly, complaint being C.R.No.I-37/2005 came to be registered with Valabhipur Police Station under Section 302 of the I.P.C.

3. On the basis of the complaint, the investigation was commenced. Statements of various witnesses were recorded. The appellant-accused came to be arrested and sent to judicial custody. Panchnama of scene of offence was drawn and muddamal used by the appellant-accused in the offence was also seized under the panchnama. During the course of treatment, the complainant succumbed to the injuries and, hence, inquest panchnama was also drawn in the presence of panchas and also made arrangements for sending the dead body for postmortem. After arrival of the postmortem note, it was kept with the investigation papers. After completion of the investigation and, on the basis of the material collected against the appellant-accused, since the Investigating Officer found

prima facie case against the appellant-accused, he submitted charge-sheet before the Learned Judicial Magistrate, First Class, Vallabhipur, which came to be registered as Criminal Case No.207/2005. Since the case registered against the appellant-accused was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions under Section 209 of the Criminal Procedure Code vide order dated 11.11.2005, which came to be numbered as Sessions Case No.211/2005. The Court below framed charge vide Exh.3 on 18.01.2006 against the accused. The charge was read over and explained to the accused. The accused pleaded not guilty to the said charge and prayed for trial.

4. To prove the case against the appellant-accused, the prosecution examined the following witnesses :-

(1) Prosecution Witness No.1 viz., Bhadreshbhai Shyamsundar, Exh.7.

(2) Prosecution Witness No.2 viz., Laxmanbhai Mathurbhai, Exh.10.

(3) Prosecution Witness No.3 viz., Sanjaybhai Laxmanbhai, Exh.11.

(4) Prosecution Witness No.4 viz., Vikrambhai Mathurbhai, Exh.12.

(5) Prosecution Witness No.5 viz., Vijaychadrabhaj Ramdevputram, Exh.28.

(6) Prosecution Witness No.6 viz., Raghuvirsinh Juvansinh Parmar, Exh.30.

(7) Prosecution Witness No.7 viz., Mulubhai Rajashibhai Gothaniya, Exh.32.

5. The prosecution also relied on various documentary evidence viz., yadi sent for recording the dying declaration at Exh.8, dying declaration of the deceased at Exh.9, yadi of P.S.I. 'A' Division Police Station at Exh.13, yadi of P.S.O. 'A' Division Police Station sent to Valabhipur Police Station at Exh.14, arrest panchnama at Exh.15, panchnama of body position at Exh.16, panchnama of seizing clothe of the deceased at Exh.17, inquest panchnama at Exh.18, death declaration form at Exh.19, yadi sent to Executive Magistrate for inquest at Exh.20, yadi sent to Medical Officer for performing postmortem at Exh.21, FSL report at Exh.22, yadi of handing over the dead body at Exh.23, arrest memo at Exh.24, police yadi for performing postmortem at Exh.25, yadi received by the Valabhipur Police Station at Exh.26, yadi sent to Head Constable at Exh.27, Postmortem note at Exh.29, complaint at Exh.31, receipt received from FSL, Junagadh at Exh.34, Analysis report of the FSL, Junagadh at Exh.35, report for addition of section at Exh.36, xerox copy of station diary at Exhs.38 and 39 and offence place panchnama at

Exh.40.

6. The learned 2nd Additional Sessions Judge, Bhavnagar, after considering and appreciating the evidence on record, was of the view that the prosecution has successfully established the guilt against the appellant-accused for having committed offence punishable under Section 302 of the Indian Peal Code and, therefore, he accordingly, passed the order of conviction and sentence against the appellant-accused as stated hereinabove.

7. Being aggrieved and dissatisfied with the judgment and order of conviction dated 24th February, 2006 passed by the learned 2nd Additional Sessions Judge, Bhavnagar, the appellant-accused has sent this appeal through jail authority. On receiving the same, it has been numbered as Criminal Appeal No.645/2006 and same has been handed over to the learned counsel, Ms.Sadhana Sagar to appear as amicus curiae.

8. Heard learned counsel for the appellant-accused, Ms.Sadhana Sagar and learned APP Mr.R.C. Kodekar for the respondent-State at length. R & P are also with us.

9. It has been mainly argued by the learned counsel for the appellant, Ms.Sagar that the prosecution

has failed to establish that the death of the deceased is homicidal death. After taking us through the evidence of P.W.No.5, Dr.Vijaychatrabhaj Ramdevputram, Exh.28, it has been argued that the appellant ought not to have been convicted by the Court below for the offence under Section 302 of the IPC. She also took us through the evidence of P.W.No.3 viz., Sanjaybhai Laxmanbhai, Exh.11, brother of the deceased, who was present at the time of incident and argued that though this witness narrated whole incident to his father and his uncle, he admitted in his cross-examination that except police, he did not narrate the same to anybody else. It is also argued that as such Sanjay is not the witness of the incident, but is a got up witness. His statement was recorded by the police on the next day of the incident and, hence, evidence of P.W.No.4 viz., Vikrambhai Mathurbhai, who is father of the deceased has no value in eye of law because his evidence is recorded at the earliest after the incident was narrated to him by the P.W.No.2, Sanjay. After taking us through the evidence of P.W.No.2 viz., Laxmanbhai Mathurbhai at Exh.10, who is father of the deceased, it has been argued that as per the

prosecution case, he was not at home at the time of incident because he was taken to doctor by his wife due to ill-health. However, in his deposition, he stated that his daughter narrated the incident, which is not believable. She also took us through the evidence of P.W.No.1 viz., Bhadreshbhai Shyamsundar at Exh.7 and argued that there are no evidence on record to show that at the time of recording the dying declaration, the deceased was conscious or she was in fit state of mind for giving dying declaration. In this regard, she took us through the endorsement along with the certificate issued by the Dr.Dave, which is a part of the record of the dying declaration and argued that the prosecution has not examined Dr.Dave, who has given opinion regarding the state of mind of the deceased and, therefore, the evidence of this witness is required to be discarded. In absence of that, there are no evidence on record to connect the accused with the crime in question and the appellant-accused is falsely involved in the offence and, therefore, it is a fit case, wherein the appellant-accused is required to be acquitted from the charge levelled against him and the judgment and order of conviction dated 24th

February, 2006 passed by the learned 2nd Additional Sessions Judge, Bhavnagar in Sessions Case No.211 of 2005 is required to be quashed and set aside.

10. Mr. R.C. Kodekar, learned Additional Public Prosecutor, took us through the reasoning of the learned Additional Sessions Judge and submitted that no interference is called for as the prosecution has established the case against the appellant-accused beyond any manner of doubt. It is submitted by the learned APP that there are sufficient evidence available on record to connect the appellant-accused with the crime in question. It is also submitted that there is an eyewitness to the incident, who is brother of the deceased and whose presence at the time of incident at about 10:00 a.m. in the house is natural one as well as his conduct is also natural one. He immediately tried to help her sister by pouring water to extinguish fire. He also shouted for help and as a result of that, aunt of this witness rushed there. At that time, mother and father of the deceased went to dispensary due to ill-health of the father of the deceased. It is a general tendency of the human being that he may inform why he has come for calling him immediately and, therefore, it is

submitted that his conduct is natural one and he has not exaggerated anything in his evidence and minor discrepancies should not come in the way in this type of heinous crime. After taking us through the evidence of Executive Magistrate, who reached at Sir.T. Hospital for recording the dying declaration after receiving the yadi from the police, it is submitted that this dying declaration recorded by the Executive Magistrate is third in line because first dying declaration is given by the deceased before her father, second before the police. The Executive Magistrate took sufficient care for recording the dying declaration and for that, he contacted concerned doctor, who was discharging his duty in the said ward and, thereafter, he went to the victim and obtained the opinion from the doctor about the consciousness of the deceased for giving dying declaration and doctor made endorsement on the certificate about the fit state of mind of the deceased. It is submitted that doctor has not been examined though he is an independent witness, who was there for the purpose of discharging his duty. Therefore, it cannot be said that the Executive Magistrate is an interested witness as no question to that effect

was asked to him in his cross-examination and even no suggestion was made and, hence, his evidence being trustworthy is required to be believed. Mr.Kodekar has also placed reliance upon the judgments reported in 2002(6) SCC 710, (2004) 13 SCC 308. He has also placed reliance upon 2003(11) SCC 534, more particularly, at head note (B), which reads as under :-

"Evidence Act, 1872 – S.32(1) – Dying declaration – Medical certification as to fitness of state of mind of declarant – Proof – Requirement of – Nothing on record to suspect the bona fides of Naib Tahsilar (PW 6) who recorded the declaration – Evidence of PW 6, on facts, reliable – Court satisfied that the declaration was made by deceased who was in a fit mental condition while making the same – Hence, held, irrespective of whether endorsement of doctor (about fitness of state of mind of declarant) proved in accordance with law or not, there was no reason to discard the said dying declaration."

Placing reliance upon the aforesaid judgments, Mr.Kodekar submitted that law on dying declaration is settled and there are no lecuna worth the name and dying declaration is trustworthy and, therefore, the Court below has rightly accepted the same in toto. It is submitted that it is not the case of the other side that the victim has not received burn injuries and it was accidental burns injuries and she succumbed to the injuries after

some days. Later on or during the period of treatment, if any infection has taken place due to burns injuries received by her, seriousness of the offence will not go away. It is also submitted that there are witness of the incident and dying declaration also supports the case of the prosecution. It is also submitted that the appellant-accused is a married man staying with the family members of the deceased and the victim, who is just like his sister or daughter and looking to the way in which he was insisting and the way in which he has acted, no lenient view should be taken.

11. We have gone through the oral as well as documentary evidence shown to us by the learned counsel for the respective parties and the reasoned judgment delivered by the Court below shown. We have minutely evaluated the same in toto. Before we consider the rival submissions, we must bear in mind one important aspect that the deceased was a minor girl aged about 15 years and her engagement has been taken place some time before the incident. It is not in dispute that the appellant-accused is married man and was staying along with the family members of the victim since last two years in the

same house. It is also not in dispute regarding the date and time of the incident and, therefore, if we proceed further on that basis then it is established that the incident took place in the broad day light at about 10:00 a.m. and the victim and the appellant-accused were known to each other as they were staying in the same house and, therefore, question of misidentity may not be arisen. Over and above, the prosecution has able to prove the incident by way of oral evidence of the eyewitness viz., Sanjay, aged about 11 years, who is brother of the victim. According to the prosecution, this witness and the deceased were present at the time of incident because their father was taken to dispensary by their mother due to ill-health. The presence of Sajay was natural one at the time of incident, who immediately tried to help his sister and also shouted for help. On arrival of his aunt, he went to call his father and narrated the incident to his father and his uncle. In these circumstances, his evidence narrating the incident to his father and his uncle is absolutely believable one, which is established from his cross-examination and, therefore, there is no reason to disbelieve him. Evidence of doctor is

also believable because he took sufficient care before recording the dying declaration. He obtained sanction from the concerned doctor regarding the fit mental state of mind of the deceased and, thereafter, he recorded the dying declaration. In his cross-examination, he stuck to his version and nothing contrary was found in favour of the appellant-accused. Evidence of P.W.No.4 viz. Vikrambhai Mathurbhai, who was examined at Exh.12 is also trustworthy and prosecution also gets support from his evidence. In his evidence, he deposed that while taking the deceased to the hospital, she narrated whole incident in detail before his father. In his cross-examination, he stuck to his earlier version and nothing contrary was found. From the dying declaration given by the deceased, the prosecution also gets much more support. Not only that, after the deceased was taken to Sir.T. Hospital, Bhavnagar, yadi has been sent to 'A' Division Police Station, Bhavnagar. In pursuance of that, P.S.I., Mr.Raghuvir reached hospital and recorded the complaint given by the deceased in detail, wherein also, she narrated the incident in toto along with the role played by the appellant-accused and, hence, it is the second

dying declaration given by her before the police by way of complaint. It is to be noted that as her physical condition was serious, yadi has been sent to that effect by the P.S.I. to Executive Magistrate for the purpose of recording the dying declaration and on receiving the same at Exh.8, Executive Magistrate reached the hospital. In the deposition of the Executive Magistrate, he narrated the same in detail, wherein he categorically deposed that first, he went to Sir.T. Hospital and contacted Dr.Dave, who was discharging duty as Medical Officer at the relevant time and, thereafter, he obtained certificate regarding the fit state of mind of the deceased and, thereafter, he reached at the cot of the victim and, thereafter, recorded the dying declaration at Exh.9. We have also gone through the same, wherein doctor has given certificate to that effect, which is a part of the dying declaration and signed by the doctor himself, wherein also, his name is written. On going through the same, we are of the opinion that while recording the dying declaration by the Executive Magistrate in the presence of doctor after obtaining endorsement to that effect from the doctor, sufficient care was taken and,

hence, it is trustworthy and, therefore, the contention raised by the learned counsel for the appellant-accused is untenable, Law has been settled by the Apex Court in that respect and for that, reliance has been placed by the learned APP. In view of the above, there is no substance in the contention raised by the learned counsel for the appellant-accused.

12. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of STATE OF KARNATAKA VS. HEMAREDDY reported in AIR 1981 SC 1417 which reads as under:-

> ".... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

13. In these circumstances, it is a fit case, wherein appeal is required to be rejected.

14. The appeal is rejected.

(R.P.DHOLAKIA, J.) (M.D. SHAH, J.)

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